

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S  
SUPPLEMENTAL  
BRIEF**



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

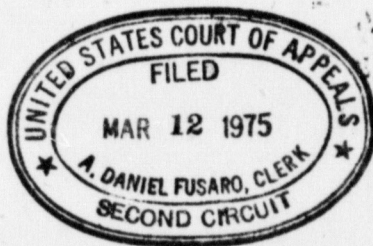
TOMMY ROBBERTS,

Appellee.

Docket No. 75-1052

SUPPLEMENTAL BRIEF FOR APPELLEE

ON APPEAL FROM AN ORDER  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:
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Appellant,	:
	:
-against-	:
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TOMMY ROBERTS,	:
	:
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ARGUMENT

THE INDICTMENT WAS PROPERLY DISMISSED  
UNDER RULE 48(b), Fed.R.Cr.P.

On February 25, 1975, this Court decided United States v. Furey, Doc. No. 74-2266, slip opinion 1917. In that decision, the Court resolved several issues concerning the inherent power of the District Court to dismiss an indictment with prejudice for failure to prosecute:



... Restated in Rule 48(b), F.R.Cr.P.,  
... this power is independent of Sixth  
Amendment considerations, being an  
outgrowth of the court's supervisory  
authority with respect to its own  
jurisdiction. Its exercise has tra-  
ditionally been within the court's  
discretion.... Dismissal under the  
power may be without prejudice ... or  
with prejudice.

Slip opinion at 1924-1925.

The opinion unequivocally states that dismissal with prejudice  
is not limited to Sixth Amendment violations. Slip opinoin at  
1925.

In this case, Judge Dooling's order dismissing the indict-  
ment is justified as an exercise of his discretion. The Govern-  
ment's conditions for its bargain unnecessarily deprived Mr.  
Roberts of a substantial right -- consideration for young adult  
offender treatment. As pointed out in the main brief for Mr.  
Roberts, this right would have accrued at the time the convic-  
tion took place, either by plea or by verdict. The Government  
acknowledges that it usually proceeds in cases of cooperation  
by delaying sentencing. Here, it chose to delay disposition  
of the entire case until after the Smith trial, and then took  
no steps to move ahead on that proceeding. The record supplies  
no justification for the delay which resulted in the prejudice.

The remedy of dismissal under Rule 48(b), requested by  
counsel in her motion to dismiss,\* accomplishes only what Mr.

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\*The Judge did not rely on Rule 48(b) in his order, but  
counsel's request for such relief is sufficient to justify a  
finding here.

Roberts would most likely have been entitled to in a properly conducted proceeding. Indeed, the finding of "benefit" necessary under the statute to impose youth offender treatment would be a fortiori for this cooperative first offender.

There was no abuse of the discretion in the case, and the order below must be affirmed as the proper use of authority under Rule 48(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 12, 1975

I certify that a copy of this supplemental brief  
has been delivered by messenger to the United States  
Attorney for the Eastern District of New York.

